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No. 08-135

In the Supreme Court of the United States

CITY OF POCATELLO, IDAHO, PETITIONER

v.

STATE OF IDAHO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 10 of the Pocatello Townsite Act, Act of Sept. 1, 1888, ch. 936, 25 Stat. 455, grants petitioner an express federal right to waters on the Fort Hall Indian Reservation, rather than a right of access thereto and an opportunity to establish a water right under Idaho law through the beneficial use of water.

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OPINIONS BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 1a-30a) is reported at 180 P.3d 1048. The memorandum decision and order of the district court (Pet. App. 31a-92a) and the relevant order of the Special Master (Pet. App. 101a-135a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on February 19, 2008. A petition for rehearing was denied on April 3, 2008 (Pet. App. 136a-137a). On June 13, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 1, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

This case involves petitioner's claim that it enjoys a right under federal law to divert and use a substantial quantity of water from the Snake River system. Petitioner filed its federal-law claim as part of the basin-wide Snake River Basin Adjudication, a consolidated water-rights proceeding conducted by an Idaho state district court. The state district court rejected petitioner's federal claim and certified its order for appeal. The Supreme Court of Idaho affirmed. Pet. App. 1a-30a.

1. Petitioner occupies territory that was formerly part of the Fort Hall Indian Reservation, on which Bands of the Shoshone and Bannock Tribes (Tribes) reside. The Reservation was created by Executive Order of President Andrew Johnson in 1867. Pet. App. 2a; see 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 836-837 (1904). The Tribes and the United States subsequently signed the Second Treaty of Fort Bridger, which confirmed the creation of the Reservation and provided for federal services to its residents. Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, July 3, 1868, 15 Stat. 673. The treaty also provided that any cession of reservation land would require the consent of "at least a majority of all the adult male Indians occupying or interested in the same." *Id.* Art. XI, 15 Stat. 676.

In 1878, the Utah Northern Railway Company built a north-south railroad line across the Reservation without obtaining permission from the Tribes or from the United States. Pet. App. 2a. In 1881, the railroad negotiated with the Tribes for an east-west right-of-way, which Congress approved. Act of July 3, 1882, ch. 268, 22 Stat. 148. The two railroad lines intersected at a site

called Pocatello Junction, petitioner's present-day location. Pet. App. 2a.

Non-Indians established a settlement at the site, trespassing on reservation lands. Despite efforts by federal officials to have the trespassers removed, the settlement remained. In 1887, federal officials negotiated a Cession Agreement with the Tribes whereby the United States would convey the Pocatello Townsite to the residents of the town and a right-of-way to the railroad for its existing tracks. Neither the negotiations that led to the Cession Agreement nor the Agreement itself discussed water or a right of access across the Reservation for water. Pet. App. 2a-3a.

When the time came to submit legislation to Congress to ratify the Cession Agreement, however, some discussion arose concerning the town's access to water. Pet. App. 3a-4a. The Commissioner of Indian Affairs accordingly proposed adding to the implementing legislation a water-related provision, Section 10, which he explained as follows:

> Inasmuch as conflicting opinions seem to prevail as to the source or sources from which the town will derive its supply of water, I have deemed it advisable, as a matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the water of any river, creek, stream or spring flowing though the reservations lands in the vicinity of the town, with the right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works or other aqueducts, drain and sewerage pipes, and other appliances on the reservation, as

> may be necessary to provide with proper water and sewerage facilities.

Id. at 4a-5a. When the Secretary of the Interior submitted the draft legislation to the President, he summarized Section 10 as "provid[ing] for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing though the reservation lands in the vicinity of the townsite." *Id.* at 41a.

Congress ratified the Cession Agreement by enacting the legislation known as the Pocatello Townsite Act. Act of Sept. 1, 1888, ch. 936, 25 Stat. 452 (Townsite Act). Section 10 of the Townsite Act provides:

> That the citizens of [Pocatello] shall have the free and undisturbed use in common with the [Shoshone and Bannock] Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

25 Stat. 455.

Soon after the Townsite Act's enactment, a company building a canal to Pocatello asked the Commissioner of Indian Affairs whether Section 10 would give the company the right to go on the Reservation to construct the canal. The Department of Justice opined that Section 10 conferred no such right, because Section 10 "is in derogation of the rights of the Indians as secured by treaty" and therefore "should be strictly construed." Pet. App.

20a. In the Department's opinion, properly construed, "the statute authorizes those, at the time citizens of said town, to go upon the lands of the Indian for the purpose of bringing water to the town, and for that purpose to construct, operate, and maintain a canal. This right is in the nature of a *mere license*—authority to do an act, which without such authority would be illegal." *Id.* at 20a-21a (emphasis added).

Congress responded by enacting an appropriations rider authorizing the Secretary of the Interior "to grant rights of way into and across the Fort Hall Reservation in Idaho to canal, ditch, or reservoir companies for the purpose of enabling the citizens of Pocatello to thereby receive the water supply, contemplated by [Section 10]." Act of Mar. 3, 1891, ch. 543, 26 Stat. 1011. The rider also allowed the Secretary to "attach conditions as to the supply of surplus water to Indians on said Fort Hall Reservation." *Ibid.*

Since that time, petitioner has used waters diverted primarily from two local streams. Pet. 5. For more than a century, petitioner pursued its rights to that water exclusively under state law. Pet. App. 22a; see also *id.* at 44a-45a (following the enactment of the 1891 rider, members of the Pocatello Water Company began staking claims to water from nearby creeks in accordance with state water law).

2. In 1985, the Idaho Legislature enacted legislation to begin the Snake River Basin Adjudication (SRBA), a comprehensive proceeding to determine the rights to surface and groundwater in the Snake River Basin, which encompasses most of the State. See *United States* v. *Idaho*, 508 U.S. 1, 3-4 (1993); *In re Snake River Basin Water Sys.*, 764 P.2d 78, 81 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989). Shortly thereafter,

the State commenced the SRBA in state district court. *Ibid.* Pursuant to the McCarran Amendment, 43 U.S.C. 666, which waives federal sovereign immunity and allows a State to join the United States as a defendant in a suit for the adjudication of rights to the use of water of a river system or other source, the State joined the United States as a defendant in the SRBA. See *United States* v. *Idaho*, 508 U.S. at 4. Under Idaho law, the United States was thereby obligated, like other water users, to assert any water-right claims to which it believed it was entitled, and could file objections to water-right claims of others with which it disagreed. See Idaho Code §§ 42-1420, 42-1424 (2003).

3. In 1990, petitioner filed the claim at issue here as part of the SRBA. Pet. App. 6a. Petitioner had already filed 38 other claims based on state law and including the same water rights. *Id.* at 32a, 46a, 101a. The 1990 claim asserted, as an alternative legal theory to those state-law claims, that Section 10 gave petitioner a *federal* right to water from the Fort Hall Reservation, in the quantity "determined by the court to be reasonably necessary to meet the future municipal/irrigation needs of the city." *Id.* at 33a; see *id.* at 6a, 46a. The United States, the State of Idaho, and the Tribes filed objections to petitioner's claim, taking the position that the Townsite Act did not create a federal water right. See *id.* at 102a, 114a.[1]

The SRBA Special Master granted summary judgment for the United States, Idaho, and the Tribes, denying petitioner's claim to a federal water right. Pet. App.

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[1] Petitioner's notice of claim had asserted a federal *reserved* water right, see Pet. App. 33a, but petitioner subsequently abandoned that theory and asserted that the Townsite Act had given it an *express* federal water right. *Id.* at 8a, 46a.

101a-135a. The Special Master concluded that the Townsite Act did not grant petitioner a federal water right.

4. The state district court affirmed the Special Master. Pet. App. 31a-92a. The court agreed that the Townsite Act established a right of access for appropriating water, not a water right. The district court accordingly disallowed the federal-law basis for petitioner's water-right claims. *Id.* at 91a. The court certified its order as final and appealable on that federal-law issue, pursuant to Idaho Rule of Civil Procedure 54(b). *Id.* at 92a.

5. The Supreme Court of Idaho unanimously affirmed. Pet. App. 1a-30a.

The court acknowledged as a threshold matter that "[n]o one disputes Congress' power to make a grant of water rights," pursuant to the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2. Pet. App. 10a. But, the court noted, "[m]erely because Congress *could* have granted [petitioner] a federal water right does not mean it did so in this case." *Ibid.*; see *id.* at 29a.

The court concluded that the statutory text showed that Congress did not grant petitioner such a right. Section 10 "does not purport to grant a property interest," does not "make reference to a 'water right,'" and does not "contain[] [any] language defining the nature and scope of any water right supposedly granted." Pet. App. 11a. By contrast, in the very next section of the Townsite Act, Congress used unambiguous words of conveyance in specifying that it "hereby granted * * * a right of way" to the railroad. *Ibid.* (quoting Townsite Act, § 11, 25 Stat. 455). "Congress could easily have used [such language] in Section 10 but did not." *Id.* at 12a. Thus, the court stated, "[a] plain reading of the statu-

tory language shows that [petitioner] was not granted a federal water right." *Id.* at 13a.

Next, the court bolstered its conclusion by noting "the rule of strict construction that federal courts apply to statutes in which the government grants privileges or relinquishes rights." Pet. App. 11a. Under that clear-statement rule, such federal grant statutes are read to transfer no more than "what is conveyed in clear and explicit language." *Ibid.* (quoting *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919)); see *id.* at 7a-8a.

The court also confirmed that "[e]ven if the language were determined to be ambiguous, [petitioner's] claim would fail." Pet. App. 13a. Petitioner's interpretation of the Townsite Act, the court observed, would run contrary to the history of federal policy in dealing with water in the West, "through [which] runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 16a (quoting *California* v. *United States*, 438 U.S. 645, 653 (1978)). The court concluded that because Congress has incorporated that policy of deference into "a century's-worth" of federal statutes both before and after the Townsite Act, *id.* at 15a-17a, it would have used "explicit language" if it had intended Section 10 to be interpreted as a grant of federal water rights to petitioner's non-Indian citizens, *id.* at 17a.

Furthermore, the court determined that petitioner's claim conflicted with "the background for inclusion of Section 10 in the 1888 [Townsite] Act." Pet. App. 17a-22a. The discussions over the Cession Agreement "did not relate to water rights and who should have them but, rather, water sources and how to ensure that the City had access to them" without unlawfully trespassing on Indian land. *Id.* at 19a. And the Justice Department

opinion and subsequent appropriations rider, see pp. 4-5, *supra*, similarly involved access to water supplies, not water rights. Pet. App. 22a. "Thus," the court concluded, "neither the history or purpose of the [Townsite] Act supports [petitioner's] claim to a federal water right." *Ibid.* The court similarly found no subsequent history to support petitioner's claim of a federal water right as opposed to an opportunity to acquire water rights under Idaho state law. *Id.* at 20a-22a.

Finally, the court rejected petitioner's contention that the phrase "in common with" in Section 10 has an established interpretation that confers water rights, not just access rights. The cases to which petitioner pointed as announcing that interpretation, the court noted, all construed the phrase *in Indian treaties* and *for the benefit of Indian Tribes*, consistent with the canon of construction that ambiguities in Indian treaties are resolved in the Indians' favor. Petitioner, by contrast, seeks to interpret a federal statute for its own benefit, not the Tribes'. See Pet. App. 22a-25a. "Thus," the court held, "if Section 10 was ambiguous, [the] Court would construe it in favor of the Tribes, not [petitioner]." *Id.* at 26a.

As "[a]n additional consideration" on this point, Pet. App. 26a, the court noted two reasons not to adopt petitioner's reading, which would give petitioner a portion of the water right impliedly reserved to the Tribes by the Second Treaty of Fort Bridger, *id.* at 27a. See *Winters* v. *United States*, 207 U.S. 564 (1908). First, the abrogation of Indian treaty rights by statute generally requires a clear statement. Pet. App. 27a (citing *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). Congress did not expressly abrogate the Tribes' treaty rights, whereas it did so in another, near-contem-

poraneous townsite act adopted in 1885 and involving land in Pendleton, Oregon. See *id.* at 28a-29a; see also *id.* at 11a-12a. Second, the Tribes were never asked to give their consent to cede their water rights to petitioner, as the Second Treaty of Fort Bridger would seem to require and as was apparently done before the adoption of the 1885 Pendleton townsite act. See *id.* at 28a-29a. The absence of any "[s]erious discussions between the federal officials and the Indians" on the subject indicated to the court that Section 10 was not the sort of cession that would trigger the approval requirement. *Id.* at 28a.

ARGUMENT

The Supreme Court of Idaho correctly concluded that Section 10 is best understood to grant petitioner an opportunity to appropriate water under Idaho state law. That straightforward interpretation of a site-specific federal statute does not conflict with any decision of this Court or another appellate court, and it has no application elsewhere. Indeed, Section 10 appears never to have been construed in any previous reported case.

Furthermore, although petitioner raises various challenges to subsidiary aspects of the state supreme court's reasoning, it does not grapple with the court's central point: that "[a] plain reading of the statutory language shows that [petitioner] was not granted a federal water right," Pet. App. 13a. Rather, petitioner's contentions all pertain only to the court's *alternative* holding that petitioner would still lose "[e]ven if the language were determined to be ambiguous," *ibid.* The questions presented accordingly do not affect the outcome of this case, which is alone a sufficient reason not

to grant further review. In any event, petitioner's contentions lack merit.

1. Petitioner contends (Pet. 20-24) that the court below wrongly "reli[ed] on the absence of tribal consent" to cede any of the Tribe's reserved water rights to petitioner, and petitioner suggests that the court's reasoning broadly questions Congress's "constitutional power" to abrogate Indian treaty rights without obtaining the tribe's consent. Pet. 20. Petitioner misreads the court's opinion.

First, the court repeatedly made clear that it was not questioning Congress's power to legislate, despite petitioner's contentions to the contrary. Pet. App. 10a, 27a, 29a. Indeed, the court expressly stated that "Congress certainly has the power to abrogate Indian treaty rights." *Id.* at 27a. The court simply concluded that Congress did not choose to exercise that power in Section 10. *Id.* at 10a, 27a, 29a. Accordingly, petitioner's suggestion (Pet. 22-24) of a conflict with cases upholding the federal government's "plenary power over Indian affairs" is without merit.

Second, the court was considering the consent provision of the Second Treaty of Fort Bridger specifically. Petitioner's suggestion that the court announced a rule applicable to Indian law generally (Pet. 22, 25) is incorrect.

Third, the court concluded that the treaty's consent provision was relevant because *if* the Townsite Act had been intended to be read as petitioner wishes, there most likely would have been some attempt to use the treaty procedure to obtain the Indians' consent—as the government did with respect to other aspects of the Townsite Act, such as the cession of a right-of-way to the railroad. Townsite Act, §§ 1, 11, 25 Stat. 452, 455.

The absence of indication that the government made any such effort simply gave additional support to the view that Section 10 did not make the kind of cession that would require consent. Pet. App. 28a-29a. That discussion did not adopt the sort of sweeping "new rule" that petitioner suggests (Pet. 25). And it certainly does not create a conflict with cases permitting Congress to abrogate Indian treaty rights, because the court concluded that Congress intended no such abrogation here. The Second Treaty of Fort Bridger was merely an "additional consideration," Pet. App. 26a, in support of an alternative construction of an unambiguous statute.

2. Petitioner also contends (Pet. 26-31) that the court below erred in citing *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919), for the proposition that federal grants of property interests are "construed favorably to the government" and pass only "'what is conveyed in clear and explicit language.'" Pet. App. 7a-8a (quoting 250 U.S. at 20); see *id.* at 11a (similar). The two brief references to *Caldwell* were not a significant part of the court's analysis; they served only to confirm that, "[e]ven if the language [of Section 10] were determined to be ambiguous," petitioner could not prevail. *Id.* at 13a. To the extent the court below relied on *Caldwell*, it did not err.

The rule stated by *Caldwell* is well established. Accord, *e.g.*, *California* v. *United States*, 457 U.S. 273, 287 (1982) (noting "the principle that federal grants are to be construed strictly in favor of the United States"). And that rule properly applies where, as here, the contention is that the United States has made an affirmative grant of property rights—in this instance, water rights previously reserved by the federal government for the Indians' use. See *Winters* v. *United States*, 207

U.S. 564, 577 (1908); Pet. App. 27a. The court below therefore properly examined Section 10 for the clear statement required to find such a federal grant of a property interest. Petitioner derides the state supreme court's reasoning as creating a "'magic words' test." Pet. 27. But the court did not hold that any particular words were required; it merely reasoned that, "especially" in light of the principle stated in *Caldwell*, "Congress would have used more exacting language" in Section 10—such as the language it used in Section 11—"if it had intended to grant a water right to the City." Pet. App. 11a.

Petitioner also suggests (Pet. 26-31) that applying the *Caldwell* rule in the context of Indian treaty rights conflicts with decisions of this Court. Petitioner principally relies on *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), but that case is inapposite. The question in *Choctaw Nation* was whether the United States' treaties with the Cherokee, Choctaw, and Chickasaw Nations had conveyed to those Indian Tribes not just surface lands, but also the bed of the Arkansas River. *Id.* at 627-628. The Tenth Circuit relied on the *Caldwell* rule to resolve the ambiguity in the Indian treaties, and it accordingly held that title to the riverbed had remained with the United States (and subsequently passed to Oklahoma on its admission to the Union). See *Cherokee Nation or Tribe of Indians* v. *Oklahoma*, 402 F.2d 739, 747 & n.38 (1968). This Court reversed, holding that the ambiguity, like other ambiguities in an Indian treaty, should be resolved in the Indians' favor. See *Choctaw Nation*, 397 U.S. at 630-631, 634. Thus, to the extent that *Choctaw Nation* discusses the *Caldwell* rule, it simply holds that under the "exceptional circumstances" surrounding the Indian treaties at issue, *id.* at 639

(Douglas, J., concurring), the governing rule was the one construing ambiguities in the Indians' favor. *Id.* at 634 (opinion of the Court). That holding is of no benefit to petitioner, which is arguing for a broad interpretation of a grant that would take rights *away* from the Tribes.

Finally, petitioner suggests that in other cases, this Court has rejected the notion that a clear statement is required to abrogate Indian treaty rights. That assertion is incorrect. As this Court has recently explained, in a decision that postdates all of petitioner's authorities (see Pet. 28-29), "Congress may abrogate Indian treaty rights, *but it must clearly express its intent to do so.*" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (emphasis added). The cases petitioner cites merely stand for the proposition that the clear statement need not use any particular form of words and need not include a provision for definite payment of compensation to the Indians. *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 588 n.4 (1977). Thus, even if the applicability of a clear-statement rule were dispositive in this case, the court below did not contradict any precedent of this Court in applying the *Caldwell* rule in this context.

3. Petitioner also claims (Pet. 31-36) that the courts below violated the Supremacy Clause by holding that Section 10 granted petitioner only a right of access to the waters on the Reservation and an opportunity to perfect claims to those waters under state law. The state district court reached a similar conclusion, yet petitioner never raised its Supremacy Clause argument in the Supreme Court of Idaho. Accordingly, further review of this question would be contrary to this Court's longstanding practice. *E.g.*, *Howell* v. *Mississippi*, 543

U.S. 440, 443 (2005) (per curiam). In any event, petitioner's contention is incorrect.

The Supremacy Clause poses no bar to Congress's adopting state law as a rule of decision. Indeed, the Supremacy Clause does not independently restrain congressional authority. Therefore, petitioner's unsupported contention that the Constitution requires Congress to plainly manifest its intention to have state law, rather than federal law, apply to non-Indians' use of water resources is without merit.[2]

To be sure, state regulation *of Indians* on tribal land is the exception rather than the rule. See, *e.g.*, *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-474, 501 (1979). But state regulation of *non-Indians* and their access to *water* is perfectly consistent with federal policy. As the state supreme court noted, Congress historically has deferred to state law governing water use by non-Indians, rather than creating an independent system of federal water rights. Pet. App. 16a. And the state courts correctly observed that petitioner's reading of Section 10—which made no reference to a water right, the scope and nature of such a right, or how such a right would be administered—would be extremely atypical in light of this consistent federal policy.

Petitioner similarly misreads (Pet. 35-36) this Court's decision in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), in which the phrase "in common with" was

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[2] Petitioner suggests (Pet. 34 n.11) that resolution of this issue could affect certain other century-old statutes granting access to reservation lands, but offers no indication that any controversy (let alone an identical controversy) has ever arisen over the interpretation of those other statutes.

construed as the right of non-Indians to share in the quantity of a fishing resource. *Id.* at 674-678. There is no tension between the provision in Section 10 for non-Indians to "use" water "in common with" the Tribes and to "access" the water in question and the conclusion that claims of water rights acquired through such use are subject to Idaho's water laws. Section 10 refers to water "use" and "access" for that "use," which is consistent with the requirements for development of state-law water rights by actually applying the water to beneficial "use," not the conveyance of an express federal water right without regard to actual beneficial water use. By contrast, Section 11 of the Townsite Act expressly "granted * * * a right of way," showing that Congress did expressly grant property rights in this statute when that result was its intent. See also *Byers* v. *Wa-wa-ne*, 169 P. 121, 125 (Or. 1917) (discussing Congress's express "confirm[ation]" of a "water right" in the Pendleton townsite act).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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